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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

MIKHAIL NICHOLAS GORIN, *Petitioner*,
v.
UNITED STATES OF AMERICA — No. 87

HAFIS SALICH, *Petitioner*,
v.
UNITED STATES OF AMERICA — No. 88

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners herein respectfully petition this Court for a rehearing of said cause after judgment, and represent and show to the Court as follows:

Petitioners are before the Court after certiorari granted to the Circuit Court of Appeals, for the Ninth

Circuit, following judgment affirming the sentences of petitioners who were convicted of violation of the Espionage Act of June 15, 1917. The opinion of this Court was delivered on the 13th day of January, 1941, and judgment rendered affirming the judgment of the Circuit Court of Appeals.

BRIEF STATEMENT OF GROUNDS FOR THIS PETITION

We present the following reasons for a rehearing:

1. The conviction of petitioners has been affirmed upon a construction of the Espionage Act, and of the law applicable thereto, which was not presented by the prosecution or followed by the trial court upon the trial of the case. A brief reexamination of the record will demonstrate that petitioners were convicted of offenses not comprehended within the scope of the Act *as now defined* in the opinion of this Court.

2. The Court, in its opinion, has inadvertently departed from the principles of law established in the very cases cited with approval in the present opinion. According to the present opinion, the Court has apparently sanctioned the practice of giving to a jury the power to define a crime and to interpret the meaning of a criminal statute.

3. The opinion of the Court, in effect, amends the Espionage Act by writing into it extensions and qualifications which the Congress explicitly refused to adopt when the Act was passed. It is not to be assumed that the Court intended such judicial legislation and we submit that the result is to leave the Act so vague that

"men of common intelligence must necessarily guess at its meaning and differ as to its application", which "violates the first essential of due process of law". The opinion in this case is in *exact verbal conflict* with the opinion in Lanzetta v. New Jersey, 306 U. S. 451.

In view of the importance of a clear, intelligible construction of the Espionage Act in this critical time, we earnestly urge upon the Court the reconsideration of its opinion and judgment. Looking beyond the question of justice to the present petitioners, we submit that the law, as interpreted in the present opinion, will be the source of unjust treatment to countless innocent persons, and will imperil the preservation of civil liberty in a time when forces of intolerance and oppression are surging against constitutional barriers.

SUMMARY OF THE OPINION

In order to present the vital issues briefly, we have undertaken the following summary of the opinion of the Court, with a conscientious effort to be absolutely accurate. The opinion apparently holds:

1. That, the Espionage Act makes it a crime to reveal information connected with or related to "national defense" if those accused have "acted in bad faith", that is, have revealed "secret" or "guarded information".

2. That, information concerning "national defense" means information "referring to the military and naval establishments and the related activities of national preparedness".

3. That, "the function of the court is to instruct as to the kind of information which is violative of the statute and of the jury to decide whether the information secured is of the defined kind".

4. That, "it is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute".

CRITICISM OF THE OPINION

1. We submit that the Act makes no reference to the "secret" character of information which is not to be revealed, and is devoid of any standard (as is the present opinion of the Court) as to what information is to be regarded as "secret"—*except* when the President establishes a standard by proclamation under the provisions of Section 6, quoted in Petitioners' Brief, footnote, p. 33. The petitioners were convicted of revealing information, very little of which, if any, could be regarded as secret.[1]

If the case had been tried upon the construction of the law now announced by the Supreme Court, most of the evidence against petitioners would have been properly excluded.[2] On the contrary, the trial court

[1] The opinion of the Circuit Court of Appeals states: "Practically everything which was contained in the report appeared in a printed periodical subsequently. Other issues of the same periodical contained information of the same general nature as that contained in the reports." (*Gorin v. U. S.*, 111 F (2d) 712, 716.)

[2] The indictment did *not* charge the revelation of "secret" matter, but only "confidential" matter—two different classifications in Navy Regulations—in which "confidential matter" is specifically defined as "not endangering the national security". (Pet. Brief, p. 90.) The trial court instructed the jury: "You

(Footnote continued on page 5)

actually excluded evidence offered by petitioners to show that the revealed information *was* public property (R. 382, 485).

The Court is in error in stating that the so-called reports "gave a detailed picture of the counter espionage work of the Naval Intelligence, drawn from its own files".[3] No copies of reports were given by Salich to Gorin, but only some information contained in some reports. As the Circuit Court of Appeals wrote, "most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear". (Gorin v. U. S. 111 F(2d) 712, 716.)

2. The definition of national defense made in the government brief, and incorporated in the opinion of the Court, is, in the first place, a limitation written into the statute in order to support its constitutionality. If this limitation had been applied by the trial court, the court should have instructed the jury that, as a matter of law, the information revealed did not come within the prohibitions of the Act; because, as the Circuit Court of Appeals held "none of the reports contained any information regarding the army, the navy, any

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(Footnote continued from page 4)

need not greatly concern yourselves as to whether information falling within the purview of this indictment and which has been introduced in evidence before you, was secret, confidential or even restricted, except possibly as an element to be considered by you in determining the intent of any defendant or defendants under the statute here involved." (R. 451.)

[3] On instructions from the Secretary of the Navy, Lt. Claiborne declined to obey a subpoena for records that would have given "a detailed picture of the counter-espionage work of the Naval Intelligence". (R. 308-311.)

part thereof, their equipment, munitions, supplies or aircraft, or anything pertaining thereto". (Gorin v. U. S., supra. p. 716) In the second place, the question as to whether any particular information refers "to the military and naval establishments and the related activities of national preparedness," so that its revelation constitutes a crime, is certainly an *issue of law*. To leave it to the jury to determine such a question means to leave it to the jury to define a crime, a definition which will vary according to the mental attitude of each particular jury.

3. The present opinion holds that it is the function of the court to instruct the jury "as to the kind of information which is violative of the statute and of the jury to decide whether the information secured is of the defined kind". This ruling sanctions a vague definition of what may or may not be criminal by the court (as in the present case), and a final decision by the jury. This means that the jury, and not the statute, defines the crime.

4. The foregoing interpretation of the Court's opinion is emphasized by the next sentence in the opinion, wherein it is held that: "It is not the function of the court, *where reasonable men may differ*, to determine whether the acts do or do not come within the ambit of the statute". (Italics ours.) This apparently means that "where reasonable men may differ" as to whether it is or is not a crime to reveal certain information, the question as to what *is* a crime shall be submitted to the legislative decision of a jury.

With greater precision, we should say that the jury is thus authorized to decide whether it *was* or *was not* a crime to reveal the information. This is not only a

legislative act, but it is *ex post facto* legislation—the exercise of a power forbidden to the Congress itself by the Constitution (Article I, Section 9, Clause 3). The absolutely necessary distinction between the constitutional exercise of judicial power by a jury to decide whether a crime has been committed and the unconstitutional exercise of legislative power to decide what is a crime—seems to have been overlooked in this opinion.

Such a ruling conflicts with the exact language of precedents expressly approved in the present opinion, because, under such an interpretation, the law "fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it" (*U. S. v. Cohen Grocery Company*, 255 U. S. 81); and because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and *differ* as to its application violates the first essential of due process of law" (Lanzetta v. New Jersey, 306 U. S. 451). (Italics ours.)

We have endeavored, in the foregoing summary, to state the grounds of this petition for rehearing "briefly and distinctly"; and we respectfully submit that the issues presented justify further detailed presentation and our urgent request that the Court give to the following argument the consideration which we believe it deserves.

ARGUMENT

It is most respectfully urged that the opinion of the Court herein sustains the validity of the Espionage Act, as applied in this case, by establishing certain

propositions which appear to be so inconsistent that they leave the law in a state of most undesirable uncertainty, and demonstrate that petitioners were improperly convicted, although the judgment of the Court sustains the convictions.

1. The Court affirmed the conviction upon a construction of the statutes involved and a theory of law not urged by the prosecution or followed by the Trial Court upon the trial of the case.

The opinion holds that the statute is not uncertain in defining an offense for the reasons: First, "the obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation.'" According to the opinion, "this requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established." Then, the opinion establishes secrecy as the test of guilty intent, i. e., that if the information revealed is "secret", there must be a wrongful intent in revealing it, and it must be to the advantage of a foreign nation to obtain it. The opinion holds: "The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain."

The Court apparently holds that as a matter of law, the revelation of any "secret" information relating to "national defense" is a crime, and that the question as to whether the information revealed was or was not secret is a question of fact to be left to the jury. *This was not, however, the question submitted to the jury,*

nor was the case tried by the government on the theory that the statute prohibited only the revelation of secret information.

If the government and the Court had so construed the statute; the Court must necessarily have excluded the presentation by the government of information supposedly revealed by the defendants, which, on the contrary, had been published by "Ken" magazine in April, 1938 (R. 257, 382, 485), and information supposedly revealed by the defendants, which was common public information, as, for example, the arrival of persons in this country, etc. (See Detailed Analysis of Reports, Pet. Brief, p. 75, and references to "Ken" magazine of April, 1939, and July, 1939, in opinion of Circuit Court of Appeals. *Gorin* v. *U. S.*, *supra*, p. 716.) We respectfully submit that if the test of intent is revealing secret information, there was prejudicial error in permitting evidence to go to the jury, largely consisting of published information, or information easily obtained, mingled with only a small amount of information which could possibly be called "secret"—and none of which the Naval Intelligence Office classified as "secret".

It seems to be assumed by the Court, in this connection, that the files of the Naval Intelligence Service are entirely secret files, although the record shows that information in the files is classified in varying degrees as secret, confidential or restricted. (R. 256.)[1] The record further shows that no care was taken to guard the information herein revealed, but that, on the con-

[1] See classification of information required under United States Navy Regulations into "Secret", "Confidential" and "Restricted", based on whether or not it endangered "national security". The regulations are cited and quoted in part in Petitioners' Brief, p. 90.

trary, copies of the reports from which the information was derived were kept in the drawer of an unlocked desk (see testimony of government's witness Yoeman, Roy Hanson (R. 111, 112, 121, 123)), *to which access could be had by many persons*—the desk being in a daily unlocked office which could not be described as "guarded".

Not only was the question of the "secrecy" with which the information was "guarded", not considered as an element of the crime in the trial court, or presented as an issue upon the trial, but *the question was specifically withdrawn from the jury's consideration.* The jury was instructed (R. 451):

> "In this trial both sides have introduced evidence having to do with the question as to whether a matter connected with the national defense be of a confidential, secret, or restricted nature. In reaching your verdict, you should bear in mind that under the statutes here involved you need not greatly concern yourselves as to whether information falling within the purview of this indictment and which has been introduced in evidence before you, was secret, confidential or even restricted, except possibly as an element to be considered by you in determining the intent of any defendant or defendants under the statutes here involved."

In brief, the issue of secrecy, which has been made vital in the opinion of the Supreme Court, was one only raised by the government in the Supreme Court, which secrecy now is made by this court an essential

part of the crime defined by the Act. The convictions of the defendants are sustained upon a construction of the law which was not urged or applied in the trial court, which would have compelled different rulings upon, and the exclusion of, important evidence, and the submission to the jury of an issue not submitted, to wit, was the information revealed "secret," in the sense of being information guarded by the government against public revelation and not in fact available to the general public. Here we have the extraordinary situation of men convicted of revealing information because it was "secret", when in fact it was widely known and published.

2. The Court, in its reasons given for affirming the conviction, departs from established principles of law and established rules of construction, and gives sanction to the practice of leaving to the jury, in a criminal case, the definition and interpretation of the meaning of a criminal statute.

The opinion sustains the validity of the Act, as construed, on the ground that the words "national defense have a well-understood connotation". The opinion agrees with the government contention that national defense "is a generic concept of broad connotations referring to the military and naval establishments, and the related activities of national preparedness". After the Court holds that the question as to whether acts of the defendants were connected with, or related to, the national defense was properly left to the jury, the opinion further holds:

> "The function of the court is to instruct as to the kind of information which is violative of the statute, and of the jury to decide whether the information is of the defined kind. It is not the function of the court, *where reasonable men may differ*, to determine whether the acts do or do not come within the ambit of the statute."

We submit most respectfully and earnestly that according to the test laid down in the foregoing quotation, the statute must be unconstitutional under the precedents cited and approved by the Court in this opinion.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, the court quoted, with approval, the well-established rule stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, as follows:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and *differ* as to its application violates the first essential of due process of law." (Italics ours.)

Therefore, if the Court now holds that a jury is to pass upon a question "where reasonable men may differ" as to whether acts are or are not a crime, the Court has overruled one of the great safeguards of civil liberty, which, up to the present time, has been vigorously upheld.

It is for this reason particularly that we urge a reconsideration of the ruling in the present case. It is true, as the opinion of the Court points out, that

"negligence" is an issue of fact to be determined by a jury. But, negligence is the failure to exercise ordinary care, and the question submitted to the jury is whether a defendant has, by act or omission, failed to exercise ordinary care—a question depending upon common understanding of what is ordinary care[2] —*proper to be submitted to the composite opinion of a jury*. Here, however, we have a *new* crime defined by statute—not murder or theft or assault and battery, which have well-accepted meanings, but the very uncertain crime of revealing information connected with or related to national defense. Certainly the government, in the first instance, by *legislative action*, should be able to define the crime.

When the question arises as to whether certain *acts* come within the ambit of the statute, then if the statute be clear enough to define a crime, it must be the duty of the court to instruct the jury as to whether the acts charged come within the statute, and leave it to the jury to perform its function in determining the issue of fact as to whether the proscribed acts have been committed. If the statute be construed, as it has apparently been construed by this Court, to mean that a jury is free to decide in one instance that the revelation of certain information is a crime, and in another instance, to decide that the revelation of the same information is not a crime, because "reasonable men may differ", then the terms of the penal statute are clearly not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties". (*Lanzetta* v. *New Jersey*,

[2] See the justification and basis for such a rule as pointed out in the case of *Grand Trunk* v. *Ives*, 144 U. S. 408,417.

supra.) We submit most earnestly that in the language of the case just cited this "well-recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law" has been abrogated by the opinion and judgment of the Court in this case.

In the case of *Pierce* v. *United States*, 252 U. S. 239, largely relied on by the Court in its opinion, the questions submitted to the jury involved deciding the effect upon the average man of distributing a given pamphlet which the government charged interfered with recruiting. But it is well to point out the vigorous dissent of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, where, in considering the point urged and under discussion here—namely the right to submit to a jury whether or not a document came within the purview of a statute—the dissenting justices said (p. 269):

> "The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of fact or expressions of opinion. As this determination was to be made from the reading of the leaflet, unaffected by any extrinsic evidence, the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false, would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental."

The Supreme Court, in the present case, has either decided that as a matter of law the acts of defendants, if proved, constituted a crime, or else has decided that the statute leaves it to a jury to determine whether their acts constituted a crime. If the first construction of the Court's opinion is correct, then the lower court erred in not holding, as a matter of law, that the acts, if proved, constituted a crime, leaving it to the jury to determine only whether the acts were proved and whether there was a guilty intent. No one can assume that if the jury had had its attention properly focused upon the issues which should have been submitted to the jury, its verdict would have been the same. If, on the other hand, the statute itself does not, or could not, constitutionally define it to be a crime to reveal any sort of information which anyone might regard as connected with or related to the national defense, then the convictions were clearly erroneous, and should have been reversed.

3. The construction of the statute by the Court constitutes a form of judicial legislation by reading into the Espionage Act provisions not enacted by Congress.

Congress did not include any words in the statute indicating that the "document . . . or information relating to the national defense", the obtaining and transmitting of which is proscribed by the statute, should be of a "secret" or "guarded" nature, or kept in the files which could be termed of that character. Neither did it define national defense in the terms or language used by the Court in its opinion. The Con-

gress could have very easily and directly done so by the use of appropriate words.

On the contrary, it is significant that the Congress rejected the original provision of the House Bill which gave the President power, in time of war or national emergency, to designate as within the purview of the statute "any matter or thing or information belonging to the government or contained in the records or files of any executive department".[1] Such a statutory provision at least would have given notice to all persons possibly affected that the government wanted certain information held "secret". The Congress finally granted the President only the limited power now found in Section 6 of the Espionage Act.[2] The opinion of the court grants greater power to a jury to define a crime *after it has been committed*, than the Congress was willing to give to the President to define a crime *before* it has been committed.

It should also be noted that the explicit language used elsewhere in the Espionage Act (as in Section 2 (b) and Section 3) shows that the Congress intended definitely to limit the scope of the Act—particularly in time of peace—to punishing the revelation of *definitely described* information of obvious military value to a hostile nation—to punishing a wrongdoer who intended to injure the United States

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[1] See legislative history of Bill, Petitioner's Brief, p. 25, et seq.

[2] Section 6 empowers the President by proclamation "in time of war or in case of national emergency" to add to the places designated in Section 1(a)—"*Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defense". The present opinion makes this section meaningless and superfluous.

or to give a military advantage to a potential enemy.

It is respectfully submitted that to amend this statute by extensions and qualifications written into it by judicial opinion would be to indulge in judicial legislation, which is not warranted in order to sustain a conviction in any case, and which in the present instance would amount to creating a crime which the Congress itself definitely refused to create.

CONCLUSION

The Court itself recognized the importance of the questions here presented, in granting certiorari. The opinion of the Court evidences a clear desire to uphold the constitutional protections which have been maintained in such cases as *U. S.* v. *Cohen Grocery Company*, supra, *Lanzetta* v. *New Jersey*, supra, and other cases of similar import.

But we submit that the Court has withheld from these petitioners, and has seriously weakened for all citizens, these constitutional safeguards of civil liberty, because—

1. The present opinion writes into the Espionage Act a limitation that illegally revealed information must be secret or guarded information. This was not the construction of the statute under which petitioners were indicted or tried.

2. The present opinion writes into the Espionage Act a dangerously broad definition of "national defense".

3. The present opinion announces a new doctrine —that when "reasonable men may differ" as to whether an act constitutes a crime, the issue may be left to the decision of a jury.

Thus, a jury is empowered to define the same act

as a crime today and a good deed tomorrow. Upon the same state of facts, one man may be convicted by one jury and sentenced, as here, to six years penal servitude, and another man may be held by another jury to be guiltless of any crime—simply because "reasonable men may differ" as to what acts ought to be regarded as crimes and be punished. This has never been the law. It should never be made the law. We cannot believe that the Supreme Court has intended to make this the law, even in one case.

WHEREFORE, petitioners pray that a rehearing may be granted in this case and that the judgments against them may be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned attorneys for petitioners Mikhail Nicholas Gorin and Hafis Salich do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

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SETH W. RICHARDSON,
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Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

Nos. 87, 88.—October Term, 1940.

87 Mikhail Nicholas Gorin, Petitioner,
vs.
The United States of America.

88 Hafis Salich, Petitioner,
vs.
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 13, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here a judgment of the Circuit Court of Appeals affirming the sentences of the two petitioners who were convicted of violation of the Espionage Act of June 15, 1917. 111 F. (2d) 712. As the affirmance turned upon a determination of the scope of the Act and its constitutionality as construed, the petition was allowed because of the questions, important in enforcing this criminal statute.

The joint indictment in three counts charged in the first count violation of section 1(b) by allegations in the words of the statute of obtaining documents "connected with the national defense"; in the second count violation of section 2(a) in delivering and inducing the delivery of these documents to the petitioner, Gorin, the agent of a foreign nation; and in the third count of section 4 by conspiracy to deliver them to a foreign government and its agent, just named. The pertinent statutory provisions appear below.[1] A

[1] Espionage Act of June 15, 1917, c. 30, 40 Stat. 217:

"Title 1. Espionage. Section 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, ... or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments

third party, the wife of Gorin, was joined in and acquitted on all three counts. The petitioners were found guilty on each count and sentenced to various terms of imprisonment to run concurrently and fines of $10,000 each. The longest term of Gorin is six years and of Salich four years.

The proof indicated that Gorin, a citizen of the Union of Soviet Socialist Republics, acted as its agent in gathering information. He sought and obtained from Salich for substantial pay the contents of over fifty reports relating chiefly to Japanese activities in the United States. These reports were in the files of the Naval Intelligence branch office at San Pedro, California. Salich, a naturalized, Russian-born citizen, had free access to the records as he was a civilian investigator for that office. Speaking broadly the reports

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for use in time of war are being made, prepared, repaired, or stored, . . . ; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; . . . shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

"Sec. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

. . . . . .

"Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. . . ."

detailed the coming and going on the west coast of Japanese military and civil officials as well as private citizens whose actions were deemed of possible interest to the Intelligence Office. Some statements appear as to the movements of fishing boats, suspected of espionage and as to the taking of photographs of American war vessels.

Petitioners object to the convictions principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the act unconstitutional as violative of due process because of indefiniteness.

The philosophy behind the insistence that the prohibitions of sections 1(b) and 2(a), upon which the indictment is based, are limited to the places and things which are specifically set out in section 1(a) relies upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country. It would require, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available which deal with food production, the advances of civil aeronautics, reserves of raw materials or other similar matters not directly connected with and yet of the greatest importance to national defense. The possibility of such an interpretation of the terms "connected with" or "relating to" national defense is to be avoided by construing the act so as "to make it a crime only to obtain information as to places and things specifically listed in section 1 as connected with or related to the national defense." Petitioners argue that the statute should not be construed so as to leave to a jury to determine whether an innocuous report on a crop yield is "connected" with the national defense.

Petitioners rely upon the legislative history to support this position.[2] The passage of the Espionage Act[3] during the World War

[2] H. R. 291, 65th Cong., 1st Sess.; Conference Report No. 69, 55 Cong. Rec. 3301.

[3] Other titles such as neutrality, foreign commerce and at one time censorship, 55 Cong. Rec. 2097, 2102; 2109-2111; 2262; 2265; 3145; 3259; 3266, added to the difficulties.

year of 1917 attracted the close scrutiny of Congress and resulted in different bills in the two Houses which were reconciled only after a second conference report. Nothing more definite appears in this history as to the Congressional intention in regard to limiting the act's prohibitions upon which this indictment depends to the places and things in section 1(a), than that a House definition of "national defense" which gave it a broad meaning was stricken out[4] and the conference report stated as to the final form of the present act: "Section 1 sets out the places connected with the national defense to which the prohibitions of the section apply." Neither change seems significant on this inquiry. The House bill had not specified the places under surveillance. The Conference change made them definite. The fact that the clause "or other place connected with the national defense" is also included in section 1(a) is not an unusual manner of protecting enactments against inadvertent omissions. With this specific designation of prohibited places, the broad definition of section 1202 of the House was stricken as no longer apt and, as stated in Conference Report No. 69, section 6 of the act was therefore adopted. Obviously the purpose was to give flexibility to the designated places.[5] We see nothing in this legislative history to affect our conclusion which is drawn from the meaning of the entire act.[6]

An examination of the words of the statute satisfies us that the meaning of national defense in sections 1(b) and 2(a) cannot be limited to the places and things specified in section 1(a). Certainly there is no such express limitation in the later sections. Section 1(a) lays down the test of purpose and intent and then defines the crime as going upon or otherwise obtaining information as to named things and places connected with the national defense. Section 1(b) adopts the same purpose and intent of 1(a) and then defines the crime as copying, taking or picturing certain articles such as models,

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[4] That definition read: "Section 1202. The term 'national defense' as used herein shall include any person, place, or thing in anywise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense, or security of the United States of America."

[5] 55 Cong. Rec. 3306. Subsequent legislation relating to the protection of national defense information is not important. The act of January 12, 1938, 52 Stat. 3, is to protect against innocent disclosures. S. Rep. 108, 75th Cong., 2nd Sess.

Public No. 443, 76th Cong., 3d Sess., is merely an increase of penalties.

[6] Cf. United States *v.* American Trucking Ass'ns, 310 U. S. 534, 543.

appliances, documents, and so forth of anything connected with the national defense. None of the articles specified in 1(b) are the same as the things specified in 1(a). Apparently the draftsmen of the act first set out the places to be protected, and included in that connotation ships and planes and then in 1(b) covered much of the contents of such places in the nature of plans and documents. Section 2(a), it will be observed, covers in much the same way the delivery of these movable articles or information to a foreign nation or its agent. If a government model of a new weapon were obtained or delivered there seems to be little logic in making its transfer a crime only when it is connected in some undefined way with the places catalogued under 1(a). It is our view that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in sections 1(b) and 2(a) without regard to their connection with the places and things of 1(a).

In each of these sections the document or other thing protected is required also to be "connected with" or "relating to" the national defense. The sections are not simple prohibtions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning[7] or forced anyone, at his peril, to speculate as to whether certain actions violated the statute.[8] This Court has frequently held criminal laws deemed to violate these tests invalid. *United States* v. *Cohen Grocery Company*[9], urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act,[10] that it really punished acts "detrimental to the public interest when unjust and unreasonable" in a jury's view. In *Lanzetta* v. *New Jersey*[11] the statute was equally vague. "Any person not engaged in any lawful occupation, known to be a member of any gang . . . , who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster . . ."

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7 United States *v.* Reese, 92 U. S. 214.

8 Lanzetta *v.* New Jersey, 306 U. S. 451.

9 255 U. S. 81, 89.

10 "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Act of October 22, 1919, c. 80, § 2, 41 Stat. 297.

11 306 U. S. 451.

We there said that the statute "condemns no act or omission"; that the vagueness is such as to violate due process.[12]

But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law.[13] The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established.[14] Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words "national defense" has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911.[15] The traditional concept of war

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12 Criminal statutes deemed vague: International Harvester Co. *v.* Kentucky, 234 U. S. 216, 221-224 (raising prices above "market value under fair competition, and under normal market conditions"); Collins *v.* Kentucky, 234 U. S. 634 (same); Weeds, Inc. *v.* United States, 255 U. S. 109 (exacting "excessive prices for any necessaries"); Stromberg *v.* California, 283 U. S. 359, 369 (displaying any "symbol or emblem of opposition to organized government"); Smith *v.* Cahoon, 283 U. S. 553, 564-565 (such provisions regulating common carriers as could constitutionally be applied to private carriers); Herndon *v.* Lowry, 301 U. S. 242, 261-264 (distribution of pamphlets intended at any time in the future to lead to forcible resistance to law).

13 Cf. Adequately definite criminal statutes: Lloyd *v.* Dollison, 194 U. S. 445, 450 (liquor restrictions varying according to sale at "wholesale" or "retail"); Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 108-111 (contracts "reasonably calculated" or which "tend" to fix prices); Nash *v.* United States, 229 U. S. 373, 376-378 (unreasonable or undue restraints of trade); Omaechevarria *v.* Idaho, 246 U. S. 343, 345, 348 ("any cattle range previously . . . or . . . usually occupied by any cattle grower"); Hygrade Provision Co. *v.* Sherman, 266 U. S. 497, 501-503 (meat represented to be "kosher"); Miller *v.* Oregon, 273 U. S. 657 (dangerous rate of speed; see 274 U. S. at 464-465); United States *v.* Alford, 274 U. S. 264, 267 (building fires "near" any forest or inflammable material); United States *v.* Wurzbach, 280 U. S. 396, 399 (receiving contributions for "any political purpose whatever"); United States *v.* Shreveport Grain & Elevator Co., 287 U. S. 77, 81-82 ("reasonable variations" in weight or measure); Kay *v.* United States, 303 U. S. 1, 8-9 ("ordinary fees . . . for services actually rendered").

14 Cf. Hygrade Provision Co. *v.* Sherman, 266 U. S. 497, 501.

15 36 Stat. 1084: "That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States . . . ."

as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by sections 1(b) or 2(a) depends upon their relation to the national defense, as so defined, not upon their connection with places specified in section 1(a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

At the conclusion of all the evidence petitioners sought a directed verdict of acquittal because (1) the innocuous character of the evidence forbade a conclusion that petitioners had intent or reason to believe that the information was to be used to the injury of the United States or the advantage of a foreign nation and (2) the evidence failed to disclose that any of the reports related to or was connected with the national defense. As a corollary to this second contention, reversal is sought on the ground that the trial court overruled the petitioners' objection that as a matter of law none of the reports dealt with national defense. That is, as the trial court stated the objection, that "the jury has no privilege in determining whether or no any of these reports have to do with the national defense, that that is a matter for the Court and not for the jury, as a matter of law."

To justify a court's refusing to permit a jury to consider a defendant's intent in obtaining and delivering these reports, one would be compelled to conclude that nothing in them could be violative of the law. As they gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's

plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole.

Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense "to be used . . . to the advantage of any foreign nation." No distinction is made between friend or enemy. Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain. If we accept petitioners' contention that "advantage" means advantage as against the United States, it would be a useless addition, as no advantage could be given our competitor or opponent in that sense without injury to us.

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense. Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. . . . You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. . . . You are instructed that in the second place the information, documents or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or thing has one use in peacetime and another use in wartime, you are to distinguish between information relating to the one or the other use. . . .

"The information, document or note might also relate to the possession of such information by another nation and as such might also

come within the possible scope of this statute. . . . For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

These quotations show that the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense. We are of the opinion this was properly left to the jury. If we assume, as we must here after our earlier discussion as to the definiteness of the statute, that the words of the statute are sufficiently specific to advise the ordinary man of its scope, we think it follows that the words of the instructions give adequate definition to "connected with" or "relating to" national defense. The inquiry directed at the instructions is whether the jury is given sufficient guidance to enable it to determine whether the acts of the petitioners were within the prohibitions. These instructions set out the definition of national defense in a manner favorable and unobjectionable to petitioners. When they refer to facts connected with or related to defense, however, petitioners urge that the connection should be determined by the court. Instructions can, of course, go no farther than to say the connection must be reasonable, direct and natural. Further elaboration would not clarify. The function of the court is to instruct as to the kind of information which is violative of the statute and of the jury to decide whether the information secured is of the defined kind. It is not the func-

tion of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.[16]

In a trial under an indictment for violation of section 3[17] of this same Espionage Act, this Court had occasion to consider a similar question as to the function of the jury. A pamphlet was introduced as evidence of making false statements with the intent to cause insubordination. To the objection that the pamphlet could not legitimately be construed as tending to produce the prohibited consequences this Court said: "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. . . . Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution."[18]

Viewing the instructions as a whole, we find no objection sufficient to justify reversal.

The Circuit Court of Appeals properly refused to consider the errors alleged with respect to the conspiracy count.[19]

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

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[16] Grand Trunk Ry. *v.* Ives, 144 U. S. 408, 417; Gunning *v.* Cooley, 281 U. S. 90, 94. Cf. Dunlop *v.* United States, 165 U. S. 486, 500-501.

[17] 40 Stat. 217, 219, c. 30:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

[18] Pierce *v.* United States, 252 U. S. 239, 250. Justices Brandeis and Holmes dissented, largely on the ground that the jury should not be left to decide whether statements in the pamphlet were facts or conclusions. *Id.*, p. 269.

[19] Brooks *v.* United States, 267 U. S. 432, 441.